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No. 160

# In the Supreme Court of the United States

OCTOBER TERM, 1959

ARMOUR AND COMPANY, ET AL., PETITIONERS,

*v.*

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims in *Armour and Company, et al.* v. *United States* and *Anderson Food Processing Co., et al.* v. *United States* (Pet. 28-31) is reported at 169 F. Supp. 521. The Court of Claims, without writing an opinion, decided *Capitol Packing Company, et al.* v. *United States* on the authority of the *Armour* and *Anderson* cases (Pet. 33).

### JURISDICTION

The Court of Claims dismissed the taxpayers' petitions on January 14, 1959 (Pet. 28-31, 33) and denied taxpayers' motions for rehearing on April 8, 1959 (Pet. 32, 34). The petition for certiorari was filed on June

30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

## QUESTION PRESENTED

Section 3475 of the Internal Revenue Code of 1939 and Section 4271 of the Internal Revenue Code of 1954 impose an excise tax on the transportation of property. Treasury Regulations 113, Section 148.1(d), defines "transportation" as including, *inter alia*, so-called accessorial services furnished by carriers in connection with a transportation movement (such as unloading, refrigeration and icing). The question is whether this provision of the Regulations is valid.

## STATUTES AND REGULATIONS INVOLVED

The pertinent portions of Sections 3472 and 3475(a) of the Internal Revenue Code of 1939, Section 4271(a) of the Internal Revenue Code of 1954, and Section 143.1(d) of Treasury Regulations 113 (1943 ed.) are set forth in the Appendix, *infra*, pp. 9-10.

## STATEMENT

Petitioners shipped meats and other perishable products by railroad to various points within the United States between 1949 and 1956.[1] For these transportation services, the railroads submitted bills to petitioners which included charges for such so-called accessorial services furnished by the railroads as icing and salting refrigerator cars, heating cars to protect the

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[1] In *Armour and Company, et al.* v. *United States*, the shipments involved here were made from April 1, 1953, through December 31, 1956. In *Anderson Food Processing Co., et al.* v. *United States*, the shipments were made from January 1, 1949, through June 6, 1956. In *Capitol Packing Company, et al.* v. *United States*, the shipments were made from November 15, 1952 through August 31, 1956.

contents from freezing, and unloading cars (Pet. 28). The freight bills submitted by the railroads to petitioners included, in addition to the freight charges, an item amounting to three percent of the aggregate of the freight charges (including the charges for refrigeration, heating, and unloading) representing the excise tax levied by Section 3475(a) of the Internal Revenue Code of 1939 and Section 4271 of the Internal Revenue Code of 1954. After the freight bills were paid, the railroads, in due course, turned over the tax to the United States.

Petitioners brought three actions in the Court of Claims for the refund of that portion of the transportation taxes paid on the charges for accessorial services. The taxpayers filed motions for summary judgment and judgment on the pleadings and the United States filed motions for summary judgment. The Court of Claims granted the motions of the United States, denied taxpayers' motions, and dismissed their petitions. The court held that Treasury Regulations 113 (1943 ed.), Section 143.1(d), which defines the word "transportation" for the purposes of the excise tax on transportation of property as including accessorial services furnished by carriers, properly interpreted both Section 3475(a) of the 1939 Code and Section 4271(a) of the 1954 Code and that, since the taxes sought to be recovered were admittedly imposed on charges for accessorial services, no refund could be allowed (Pet. 28-31).

ARGUMENT

1. Section 3475(a) of the Internal Revenue Code of 1939 and Section 4271(a) of the Internal Revenue Code of 1954 impose a tax on "the amount paid * * * for the

transportation of property." The only question in this case is whether Section 143.1(d) of Treasury Regulations 113 (*infra*, p. 10) properly defines the term "transportation", as so used, to include—

> accessorial services furnished in connection with a transportation movement, such as loading, unloading, blocking and staking, elevation, transfer in transit, ventilation, refrigeration, icing, storage, demurrage, lighterage, trimming of cargo in vessels, wharfage, handling, feeding and watering live stock, and similar services and facilities.

This Court has often stated that the contemporaneous interpretation of a statute by the administrator charged with its enforcement is entitled to great weight, *Commissioner* v. *Flowers*, 326 U.S. 465, 469; *Cammarano* v. *United States*, 358 U.S. 498, 510-511, and that "Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes * * *." *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501. It is also a general rule that, where a long-standing regulation interpreting a statute has received implied congressional approval by reenactment of the statutory provision involved; the regulation is entitled to be given the force and effect of law. *Helvering* v. *Winmill*, 305 U.S. 79, 83; *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 114-115; *Cammarano* v. *United States*, 358 U.S. at 510-511. But cf. *United States* v. *Calamaro*, 354 U.S. 351, 359. The court below, we submit, properly applied these principles here.

The definition of "transportation" given in the Regulations is clearly reasonable. The accessorial services there described, and particularly those involved in

the instant case, are an integral and essential part of the transportation of meat and other perishable products.[2] Thus, the effect of the regulations is merely to tax the entire charge for the transportation services furnished by the railroad. Significantly, the transportation industry itself recognizes that such accessorial services are an integral part of transportation by including the charge for accessorial services in a single transportation charge in numerous freight tariffs (see Pet. 31).

Moreover, the statute here, as well as its predecessor statutes, has been consistently interpreted by the Regulations to include accessorial services. The interpretation of the statute challenged here was first promulgated in connection with a World War I statute which, like the instant statutes, imposed a tax on the transportation of property. Revenue Act of 1917, c. 63, 40 Stat. 300, Sec. 500. This statute was reenacted as Section 500 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, and was in force until its repeal by the Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 1400. On May 1, 1919, the Commissioner, with the approval of the Secretary of the Treasury, issued Treasury Regulations 49 (1919 ed.), which in Article 2 defined transportation, so far as is relevant here, in the same way. This definition remained the same through two revisions of Treasury

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[2] Congress itself defined "transportation" in substantially the same terms, insofar as is pertinent here, in Section 1 of the Interstate Commerce Act, 24 Stat. 379, as amended by 34 Stat. 584 (1906) (49 U.S.C. 1):

> • • • the term "transportation" • • • shall include • • • all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Regulations 49, approved on January 17, 1920, and July 19, 1921. Virtually the identical statute was enacted as a World War II revenue measure in 1942 (Revenue Act of 1942, c. 619, 56 Stat. 698, Sec. 620, adding Section 3475 to the Internal Revenue Code of 1939), and the same administrative interpretation was immediately given the word "transportation."[3] On five separate occasions, Congress amended Section 3475 of the 1939 Code, though leaving the crucial word, "transportation," unchanged,[4] and eventually the statute was reenacted into the Internal Revenue Code of 1954 as Section 4271.[5]

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[3] On December 7, 1942, the Commissioner issued Mim. 5447, 1942-2 Cum. Bull. 280, defining the word "transportation" as used in Section 3475 of the 1939 Code to include "receipt, delivery, elevation, transfer in transit, ventilation, refrigeration, icing; storage, demurrage, towage, lighterage, trimming of cargo in vessels, wharfage, handling of property transported, feeding and watering live stock, and all other incidental services and facilities."

On February 1, 1943, the Commissioner, pursuant to express authority contained in Section 3472 of the 1939 Code (*infra*, p. 9), issued Treasury Regulations 113, including Section 143.1(d), which is challenged in the instant case. This section has remained in force unaltered since that time, having been made applicable to Section 4271(a) of the 1954 Code. T.D. 6091, 1954-2 Cum. Bull. 47.

[4] Act of November 4, 1943, c. 294, 57 Stat. 585, Sec. 1; Revenue Act of 1943, c. 63, 58 Stat. 21, Sec. 307(a)(9); Act of December 29, 1945, c. 652, 59 Stat. 669, Sec. 4(b); Revenue Act of 1950, c. 994, 64 Stat. 906, Sec. 607(b); Revenue Act of 1951, c. 521, 65 Stat. 452, Sec. 495(a).

[5] At that time, Congress was advised of the precise problem involved in the instant case. See statement of Theodore Sunshine of the United Fresh Fruit and Vegetable Association, House Hearings, Committee on Ways and Means, 83d Cong., 1st Sess., Part 4, General Revenue Revision (1953), pp. 2744-2748. Despite Mr. Sunshine's assertion that the tax "assessed on the costly charges for protective services as well as for freight" was a heavy burden on the fresh fruit and vegetable industry (*id.* at 2746), Congress did not modify the definition of "transportation" stated by the Regulations.

2. No conflict is shown or alleged. The issue has been decided in six district court cases, all of which have upheld the validity of the regulation. See *Arosel Co. v. United States*, decided July 31, 1958 (N.D. Cal.) (58-2 U.S.T.C., par. 15,173); *Beyer v. United States*, 167 F. Supp. 169 (N.D. Cal.); *Chas. Abbate Co. v. Jarecki*, decided March 18, 1959 (N.D. Ill.) (59-1 U.S.T.C., par. 15,223); *Litvak Meat Co. v. United States*, decided April 14, 1959 (D. Colo.) (59-1 U.S.T.C., par. 15,230), on appeal (C.A. 10); *Malone v. Wood*, decided June 9, 1959 (D. Ariz.) (59-1 U.S.T.C., par. 15,243); *McFarland and Son v. United States*, decided June 5, 1959 (D. Utah).[6] The only two contrary decisions, both rendered by the court below prior to this one (*Swift & Co. v. United States*, 144 F. Supp. 956; *Armour & Co. v. United States*, 159 F. Supp. 380), were held in the instant case to be erroneous and were expressly overruled (Pet. 29).[7] Thus, there is now a unanimity of decision among all the courts which have considered the question.

It should also be noted that the statute involved has been repealed as of August 1, 1958. Tax Rate Extension Act of 1958, P.L. 85-475, 72 Stat. 259, Sec. 4.

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[6] Another portion of the same regulation has been upheld in *Getchell Mine, Inc. v. United States*, 181 F. 2d 987 (C.A. 9).

[7] The Government submitted to the court a considerable amount of additional materials and legislative history, and, as observed in the opinion below (Pet. 29), "assumes at least a part of the responsibility for our error by confessing that its briefs in the prior cases were not as complete as they should have been."

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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JULY 1959.

Internal Revenue Code of 1939:

SEC. 3472 [as amended by the Revenue Act of 1941, c. 412, 55 Stat. 687, 722, Sec. 554(d)]. REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this chapter.

(26 U.S.C. 1952 ed., Sec. 3472.)

SEC. 3475 [as added by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 620(a), and as amended by the Revenue Act of 1950, c. 994, 64 Stat. 906, 966, Sec. 607(b)]. TRANSPORTATION OF PROPERTY.

(a) *Tax.*—There shall be imposed upon the amount paid within or without the United States for the transportation of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to the amounts paid to a person engaged in the business of transporting property for hire, including amounts paid by a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with

respect to which there has been a previous taxable transportation.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3475.)

Internal Revenue Code of 1954:

SEC. 4271. IMPOSITION OF TAX.

(a) *Property Other Than Coal.*—There is hereby imposed upon the amount paid within or without the United States for the transportation of property, except coal, by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 percent of the amount so paid.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 4271.)

Treasury Regulations 113 (1943 ed.):

Sec. 143.1 *Meaning of Terms.*—As used in these regulations, unless otherwise specified or indicated by the context—

* * * * *

(d) *Transportation.*—The term "transportation" as used herein means the movement of property by a person engaged in the business of transporting property for hire, including interstate, intrastate, and intracity or other local movements, as well as towing, ferrying, switching, etc. In general, it includes accessorial services furnished in connection with a transportation movement, such as loading, unloading, blocking and staking, elevation, transfer in transit, ventilation, refrigeration, icing, storage, demurrage, lighterage, trimming of cargo in vessels, wharfage, handling, feeding and watering live stock, and similar services and facilities.

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